



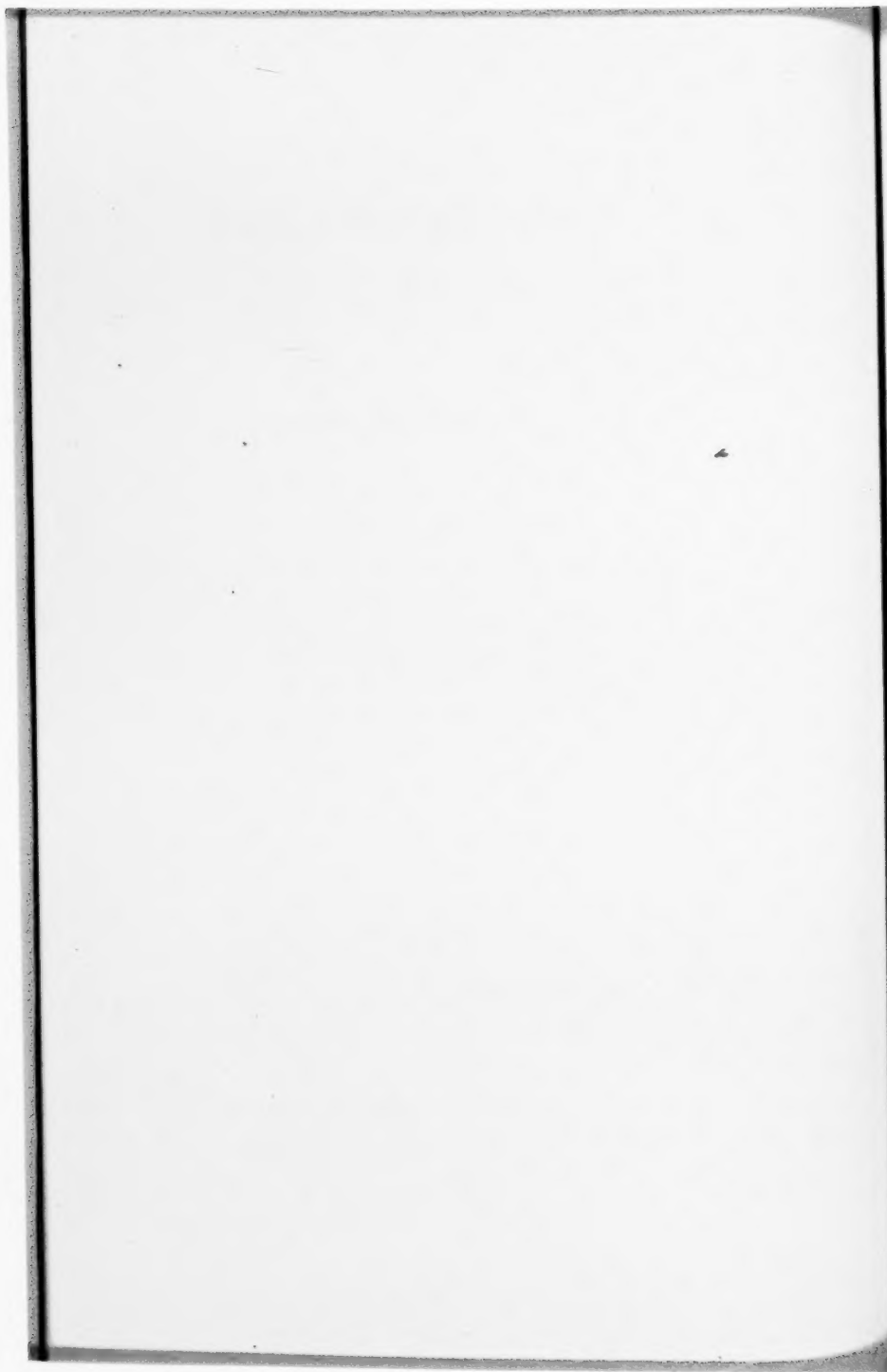
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 442

ARON ROSENSWEIG AND ABE ROSENSWEIG,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS, BELOW

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is not yet officially reported, but is set forth at pages 125-136, 138 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1944 (R. 137). A petition for rehearing was denied on August 2, 1944 (R. 138). The petition for a writ of certiorari

was filed in this Court on September 7, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. 901 et seq., as amended by the Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961; and Revised Maximum Price Regulation No. 169 (7 F. R. 10381). The pertinent provisions of the Act and of the Regulation are set forth in the Appendix, *infra*, pp. 12-21.

QUESTION PRESENTED

Whether the claim that a maximum price regulation is defective for asserted failure to comply with the requirement of the Act that no maximum prices be established for any "agricultural commodity" without the prior approval of the Secretary of Agriculture, presents the question of "whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face," reserved in *Yakus v. United States*, 321 U. S. 414, 446-447.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of California (R. 17-20) under an information filed on July 15,

1943 (R. 2) pursuant to Section 205 (b) of the Act. The information charged the petitioners individually with wilfully making wholesale sales of processed meats—sides of beef and other meat products—at prices in excess of those permitted by the applicable maximum price regulations issued pursuant to the Act. the information was in six counts; counts 1-5 alleged violations of Revised Maximum Price Regulation No. 169 (7 F. R. 10381), and count 6 charged violations of Revised Maximum Price Regulation No. 148 (7 F. R. 8609). Count 1 charged the sale of a wholesale cut of beef at a price in excess of the maximum legal price. Counts 2-6 charged similar sales and sales of other meat products at unlawful prices through the device of entering the ceiling price on the invoice slip, and then demanding and receiving a “side payment” in excess of the ceiling price.

The defendants jointly filed a demurrer (R. 11-13) and motion to quash (R. 54-56) raising issues of law, and, in particular, attacking the validity of the Act and the Regulations.¹ The District Court overruled the demurrer and motion on August 2, 1943, whereupon the defendants entered pleas of not guilty to all counts of the information (R. 14, 56).

On August 11, 1943, the defendants changed their pleas from not guilty and entered pleas of

¹ Defendant Abe Rosensweig filed a separate plea in abatement which was overruled (R. 56).

guilty to counts 1 and 3 (R. 15, 56-67). Counts 2, 4, 5, and 6 were subsequently dismissed (R. 15, 18, 50, 63).² Judgments were entered on August 30, 1943 (R. 17-20). Defendant Aron Rosensweig was sentenced to imprisonment for 30 days and to pay a fine of \$1,000 (R. 17, 61). Defendant Abe Rosensweig was fined \$1,000, and the imposition of further sentence was suspended and the defendant placed on probation for two years on condition that during that period he should not wilfully violate any price regulations issued under the Act (R. 19, 61).

Counsel for defendants objected to the sentences as too severe, describing an alleged understanding with the United States Attorney's Office concerning the sentences which were to have been recommended to the court by the Probation Officer (R. 61-62). The district court, after a hearing, refused to modify the judgments and denied a motion by defendants to vacate the judgments, for permission to withdraw their pleas of guilty and to reenter their pleas of not guilty, and for a new trial (R. 21-22, 64, 106). The defendants were admitted to bail and a stay of execution was granted (R. 34).

The defendants appealed from the judgments entered on their pleas of guilty (R. 22, 27). They urged two points in the circuit court of appeals:

² The dismissal of count 6 eliminated Revised Maximum Price Regulation No. 148 from the case.

(1) that the information was defective because the Regulation "never became effective" owing to the asserted lack of prior approval of the Secretary of Agriculture, such approval being required by Section 3 (e) of the Act prior to the establishment of maximum prices for "any agricultural commodity," the defendants contended that a side of beef, the commodity which they were charged with having sold at unlawful prices, is an "agricultural commodity;" and not a product processed from an agricultural commodity (R. 128-129); and (2) that the district court erred in refusing to vacate the judgments entered upon the pleas of guilty and permit the reentry of pleas of not guilty in view of alleged promises made to the defendants by the United States Attorney concerning the sentences which were to have been recommended to the court by the Probation Officer (R. 132-133).³ The circuit court of appeals affirmed the judgments on June 30, 1944 (R. 137). It held (1) that the defendants' claim that the Regulation was unenforceable for alleged lack of prior ap-

³ The Circuit Court of Appeals treated the appeals as also raising issues directed to the order denying defendants' motion to vacate the judgments, although the notices of appeal were addressed solely to the judgments themselves (R. 125-136). The instant Petition does not specifically bring forward any question as to the ruling on the motion to vacate or as to the alleged understanding with the United States Attorney regarding the sentences. See fn. 5, p. 10, *infra*. Other points assigned as error by the defendants in connection with the appeal were not pressed in the Circuit Court of Appeals (R. 115-119, 126).

proval by the Secretary of Agriculture constituted an attack on the validity of the Regulation and was consequently barred under the authority of *Yakus v. United States*, 321 U. S. 414 (R. 128-132, 136); and (2) that the District Court had committed no error in the imposition of sentence and in refusing to vacate the judgments (R. 132-134). On the latter point there was a concurring opinion (R. 135-136).

ARGUMENT

1. Petitioners are incorrect in their contention that this case presents the question reserved in *Yakus v. United States*, 321 U. S. 414, 446, whether "one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face." Petitioners' attack upon Revised Maximum Price Regulation No. 169 is not pitched upon any constitutional ground, but upon the ground that the Regulation fails to comply with a statutory condition governing the Price Administrator's authority to establish maximum prices. Nor can it be sensibly urged—assuming that the question would be pertinent under the foregoing reservation of the *Yakus* decision—that the Regulation has not been "duly promulgated" because of the asserted lack of prior approval by the Secretary of Agriculture. The statutory requirement of such prior approval constitutes a legislative standard substantive in character. It

expresses a special Congressional solicitude for the peculiar interests of the agricultural producer. *E. g.*, 88 Cong. Rec. 160, 77th Cong., 2d sess. The significance of this statutory requirement, then, is not that of a technical incident in the formal process of "promulgation" of price regulations. Moreover, in any case where the applicability of the requirement of prior approval might raise a substantial question, the determination of the meaning of "agricultural commodity" would be a highly appropriate matter for the uniform administrative consideration called for by section 204 (d). The application of excise tax and tariff classifications is a pertinent reminder in this regard. Cf. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492.

2. While petitioners' attack on the Regulation accordingly presents no feature suggesting the question reserved in the *Yakus* decision, the Government desires to state for the information of the Court that Revised Maximum Price Regulation No. 169 was in fact issued without prior approval of the Secretary of Agriculture, for the reason that the statutory requirement of such approval was plainly inapplicable. By the same token petitioners' claim of prejudicial error is unsubstantial.

The Secretary's approval, as stated above, is required in connection with the establishment of prices for "any agricultural commodity." The

requirement does not extend to products processed from agricultural commodities. This essential distinction pervades the entire statutory plan with respect to the regulation of prices of farm products. Compare Sections 3 (a) and 3 (b), which deal with the subject of parity prices and refer only to agricultural commodities, with Section 3 (c), which explicitly provides that the producers of agricultural commodities shall obtain parity prices and that the prices established for commodities processed or manufactured therefrom shall not be below certain designated prices (Appendix, *infra*, pp. 14-15). Compare also Section 3 of the Act of October 2, 1942, where the same distinction appears (Appendix, *infra*, pp. 17-19).

The legislative history of Section 3 (e) permits of no doubt as to the intent of Congress that the requirement of prior approval by the Secretary of Agriculture should not be applicable in the establishment of maximum prices for products processed from agricultural commodities. In its original form, as first proposed by Senator Bankhead, the section read as follows:

Notwithstanding any other provision of law, no action shall be taken by the Administrator or any other person with respect to an agricultural commodity *or commodity processed or manufactured in whole or in substantial part from any agricultural commodity* without the prior approval of the Secretary of Agriculture. [Emphasis supplied.]

Thereafter Senator Bankhead sponsored an amendment striking from the section the provisions relating to commodities "processed or manufactured * * * from any agricultural commodity." Senator Bankhead explained (88 Cong. Rec. 160, 77th Cong., 2d sess.):

In addition to agricultural commodities, the original amendment included commodities processed or manufactured in whole or in substantial part from any agricultural commodity * * * of course, we have no desire to have the amendment cover anything but products dealt with by the Department of Agriculture and in the production and price of which the farmer, the agricultural producer, has a direct, immediate, primary interest. * * * so now the amendment is brought right down to agricultural commodities.

Other Senators recognized and approved the distinction.⁴

⁴ Senator McNARY. Mr. President, I know from reading the bill that any fair-minded person must come to the conclusion that the words "agricultural commodity" refer to the raw materials produced on the farm. Otherwise, there would not be a separate subsection dealing with processed and manufactured goods. The two subsections, read together, define the term.

* * * * *

When we want to enter the field of refined, manufactured, or processed commodities, we use the proper language [88 Cong. Rec. 182, 77th Cong., 2d sess., 1942].

Senator OVERTON. When the Bankhead amendment refers to agricultural commodities it refers solely to raw agri-

Live cattle are agricultural commodities. When they are slaughtered and their carcasses dressed a processed product results. Petitioners in contending that beef carcasses are agricultural commodities place reliance upon the definition of "processed products" contained in Section 1364.477 (3) of Revised Price Regulation No. 169 (See Appendix, *infra*, p. 21). That definition has no pertinence here, where the issue is not as to the meaning of the term "processed products" as used in the internal scheme of the Regulation, but as to the basic distinction between "agricultural commodities" and products processed from agricultural commodities as that distinction is found in the statute. The Regulation prescribes maximum prices for (1) beef carcasses and wholesale cuts; (2) veal carcasses and wholesale cuts; and (3) processed products. All of these products, including carcasses and wholesale cuts, are products processed from agricultural commodities; the cultural commodities. It does not refer to processed agricultural commodities or commodities manufactured in whole or in substantial part from agricultural commodities (*Id.*, p. 173).

Senator GEORGE. As I understand, the amendment applies strictly to agricultural products, and not to processed or manufactured articles made from manufactured products (*Id.*, p. 180).

third group consists of products processed from the first two.⁵

CONCLUSION

The decision below is correct and presents no question meriting review by this Court. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
FLEMING JAMES, JR.,
ABRAHAM GLASSER,
Office of Price Administration.

OCTOBER 1944.

⁵ Other questions which may be latent in the petition in view of petitioners' adoption by reference of their assignments of error in the circuit court of appeals (Pet. p. 4) are apparently not pressed by petitioners; certain constitutional objections are stated by the court below to have been abandoned there (R. 126).